Filed 1/31/19 P. v. Limon CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FELIPE VASQUEZ LIMON, Defendant and Appellant.	G055834 (Super. Ct. No. C-73399) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Paul C. Supple, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In 1989, defendant Felipe Vasquez Limon pled guilty to one count of sale of a controlled substance (cocaine). He was sentenced to three years' probation. In 2001, defendant filed a petition for relief seeking to set aside and vacate his guilty plea and dismiss the criminal complaint. (Pen. Code, § 1203.4; all further statutory references are to the Penal Code). The petition was granted, and his case was dismissed. The dismissal apparently did not affect the immigration consequences of his drug conviction.

On March 20, 2017, defendant filed a motion to vacate his conviction under section 1473.7. That statute permits a person who is not in custody to challenge a conviction on the basis that he did not understand the immigration consequences of his plea. The prosecution opposed the motion. On August 7, 2017, the superior court denied the motion.

Defendant contends the trial court erred in denying his motion to vacate his conviction, as the evidence showed he did not meaningfully understand the immigration consequences of his plea. We disagree. The plea form and the trial court's minute order show defendant was advised about the immigration consequences of the plea. Moreover, even assuming the advisement was deficient, defendant has not shown that he would have rejected the plea based on the immigration consequences. Accordingly, we affirm the trial court's order denying defendant's section 1463.7 motion to vacate his conviction.

FACTS

In his section 1473.7 motion to vacate his drug conviction, defendant contended his guilty plea was not voluntary, knowing, and intelligent because he was never informed of the immigration consequences of his plea. Defendant claimed (1) the trial court violated section 1016.5 by not advising him of all possible immigration consequences; and (2) trial counsel failed to explain the immigration consequences or seek an alternative immigration neutral disposition. According to defendant, had he known of the immigration consequences that would attach to the plea, he would not have pled guilty.

In a declaration, defendant asserted he "would have challenged the allegations against me with the variety of defenses avail[able] to me at the time," if he had been informed of the immigration consequences. But, he did not explain what those defenses would have been. He acknowledged receiving the assistance of an interpreter and admitted being "eager to be released from jail to return to work and my family."

The section 1473.7 motion attached copies of the plea form and the relevant minute order. On the plea form, defendant initialed the box next to the statement "I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." He also initialed the box next to the statements "I have personally initialed each of the above boxes and discussed them with my attorney. . . . I declare under penalty of perjury that the foregoing is true and correct." Both defendant and his trial counsel signed the plea form. The deputy district attorney did not sign the form. The attached minute order indicated that defendant was advised of the "conseq[uences] of [the guilty] plea if not a citizen." Defendant did not attach a declaration from his trial counsel.

The People opposed the section 1473.7 motion to vacate the drug conviction. At the hearing on the motion, the deputy district attorney argued that defendant was advised of the possible immigration consequences, and that no credible evidence showed defendant would not have taken the plea had he been properly advised. Additionally, the deputy district attorney noted that the People did not join the plea because the sentence (probation for three years) was "too low."

Following the hearing, the court denied defendant's motion to vacate his conviction. The court found there was substantial compliance with the requirements of section 1016.5. Moreover, even if the section 1016.5 advisement was inadequate, defendant could not show prejudice because (1) the People's case was reasonably strong, (2) defendant failed to explain what his "defenses would or could have been," and (3)

defendant acknowledged being eager to be released from custody. Assuming without deciding counsel's alleged failure to advise defendant of the immigration consequences of the plea was deficient, the court found defendant's uncorroborated claim he would not have pleaded guilty had he known of the immigration consequences was not credible.

DISCUSSION

1. *Standard of review*

Defendant did not brief the standard of review applicable to the instant appeal. The People contend our review is for abuse of discretion. There is a split of authority among the courts of appeal on the standard of review. (See *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76, 79 (*Ogunmowo*) [concluding the de novo standard applies]; *People v. Gonzalez* (2018) 27 Cal.App.5th 738, 747-748 (*Gonzalez*) [concluding the abuse of discretion standard applies].) We need not resolve the dispute in this case because we conclude, even under the de novo standard of review, defendant has not established entitlement to relief under section 1473.7.

2. *Motion to vacate conviction under section* 1473.7

Section 1473.7 permits a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction if the conviction "is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (*Id*., subd. (a)(1).) The court must hold a hearing on the motion, and if the moving party establishes by a preponderance of the evidence he or she is entitled to relief, the court shall grant the motion. (*Id*., subds. (d) & (e)(1).)

Here, defendant bases his entitlement to relief under section 1473.7 on two assertedly prejudicial errors. First, the court failed to give him the advisement required by section 1016.5. Second, his trial counsel provided ineffective assistance by failing (1) to advise him of the immigration consequences of his plea and (2) to seek an immigration neutral plea bargain.

Regarding the first asserted error, section 1016.5, subdivision (a), provides that "[p]rior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

Here, the trial court substantially complied with section 1016.5, as the required advisement was included in the plea form, which defendant acknowledged reading, understanding, initialing, and signing. The court was not required to provide the advisement verbally. "'[A] validly executed waiver form is a proper substitute for verbal admonishment by the trial court. [Citation.]' [Citations.] The advisement need not be in the exact language of section 1016.5 and can be in writing." (*People v. Araujo* (2016) 243 Cal.App.4th 759, 762.)

Regarding the second asserted error, a "defendant who seeks to vacate a conviction on a claim of ineffective assistance of counsel must establish two things: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) he or she was prejudiced by that deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)" (*Gonzalez*, *supra*, 27 Cal.App.5th at p. 748.) Defendant argues he is *not* making an IAC claim and should not be required to establish counsel was ineffective.

However, a claim that defense counsel failed to advise defendant of the immigration consequences of a guilty plea is an ineffective assistance of counsel (IAC) claim. Section 1473.7 does not relieve defendant of his burden to show counsel was ineffective under the *Strickland* test. (*Gonzalez*, at p. 748; *Ogunmowo*, *supra*, 23 Cal.App.5th at p. 75.)

Currently, defense attorneys have an affirmative obligation to provide competent advice to noncitizen criminal defendants regarding the potential immigration consequences of guilty or no contest pleas. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 375.) However, the obligation established in *Padilla* does not apply retroactively to cases which were final when *Padilla* was decided. (*Chaidez v. United States* (2013) 568 U.S. 342, 344, 358.) Instead, at the time defendant pleaded guilty in this case, "the immigration ramifications of guilty or no contest pleas were generally considered indirect or '"collateral"' consequences of those pleas, about which a defendant need not be advised. [Citations.] Therefore, failure to advise a defendant about those ramifications could not support a claim of ineffective assistance of counsel under the first prong of the *Strickland* analysis because such a failure did not fall below a general standard of reasonableness." (*Gonzalez, supra*, 27 Cal.App.5th at p. 750.)

Defendant also contends trial counsel rendered deficient representation by failing to negotiate an "immigration-neutral" plea bargain. Defendant's claim that such a disposition could have been negotiated is pure speculation without support in the record. Also lacking evidentiary support is the claim counsel did not attempt to negotiate an alternative disposition. In short, defendant has not demonstrated trial counsel's performance fell below an objective standard of reasonableness.

Even if defendant had established his trial counsel's performance was deficient, he also had to establish prejudice, viz., show by a preponderance of the evidence that, if properly advised, he would not have entered the plea bargain. (*People v. Martinez* (2013) 57 Cal.4th 555, 559, 567 (*Martinez*).) Courts determine prejudice on a case-by-case basis in light of all of the circumstances. (*Lee v. United States* (2017) __U.S. ___ [137 S.Ct. 1958, 1966, 198 L.Ed.2d 476] (*Lee*).) In making this determination in the context of a guilty plea involving immigration consequences, courts must consider the likelihood of success at trial, the potential consequences after a trial compared to the consequences flowing from the guilty plea, and the importance of

immigration consequences to defendant. (See *Lee*, at pp. 1966-1967; *Martinez*, *supra*, 57 Cal.4th at pp. 564, 568.) Nonetheless, "'[s]urmounting *Strickland*'s high bar is never an easy task,' [citation], and the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas.' [Citation.] Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee*, at p. 1967.) "[T]he defendant bears the burden of establishing prejudice" and "must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*Martinez,* at p. 565.)

Here, the trial court found defendant's assertion that he would have rejected the plea bargain not credible. The court found that the People's case was strong, and defendant does not challenge that determination on appeal. Defendant presented no evidence or argument on the likelihood of his success at trial, including what defenses he would or could have raised. He also did not present any evidence or argument on the potential consequences after a trial compared to the consequences flowing from the guilty plea.

Finally, no contemporaneous or corroborating evidence was presented that in 1989, defendant would have rejected the plea if he had been advised of the immigration consequences of his plea. Rather, the record shows defendant was eager to be released from custody and willing to enter a guilty plea with immigration consequences, as he signed a form acknowledging his guilty plea may have immigration consequences. Accordingly, defendant has not established his trial counsel's allegedly deficient performance prejudiced him. In sum, the trial court did not err in denying defendant's section 1473.7 motion to vacate his 1989 drug conviction.

DISPOSITION

The order denying defendant's section 1473.7 motion is affirmed.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

GOETHALS, J.